Cases 10-CA-141565; 10-CA-141578; 10-CA-145467

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

TAYLOR MOTORS, INC.,
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2022, AFL-CIO

Petitioner

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION

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And **Cases 10-CA-141565**
10-CA-141578
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2022, AFL-CIO **10-CA-145467**

TAYLOR MOTORS, INC.,

And **Case 10-RC-137728**

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFGE), AFL-CIO, LOCAL 2022

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S SUPPLEMENTAL DECISION

Respondent Taylor Motors, Inc. ("Respondent" or "Taylor Motors"), by its undersigned counsel and pursuant to Rule 102.46 of the Board's Rules and Regulations, submits this brief in support of its contemporaneously-filed Exceptions to the supplemental decision of Administrative Law Judge ("ALJ") Keltner W. Locke dated September 29, 2017[1] filed in the above-captioned matter.

The ALJ erred in concluding that Respondent violated the Act by suspending and subsequently terminating Anthony Williams ("Williams"). As a preliminary matter, the preponderance of the evidence in the record does not support the ALJ's erroneous conclusion that the General Counsel affirmatively established that Williams did not make the threatening

[1] Citations to the Administrative Law Judge's original decision will be referenced as "ALJD" followed by the appropriate page and line numbers. Citations to the ALJ's supplemental decision will be referenced as "ALJSD" followed by the appropriate page and line numbers. References to the hearing transcript will be referenced as "Tr." followed by the appropriate page and line numbers. The Consolidated Complaint, Order Consolidating Cases, and Notice of Hearing will be referenced as "Compl." followed by the appropriate paragraph number.

statements attributed to him, and which resulted in his suspension and termination. Moreover, the ALJ erroneously concluded that Williams' statements were not so opprobrious so as to take him outside of the Act's protection.

Additionally, the ALJ erred in concluding that Respondent violated the Act by maintaining an unlawful and overbroad Confidentiality/Non-Disclosure Agreement ("CDNA"), and that the maintenance of such CDNA materially impacted the results of the election conducted on January 15, 2015, because that conclusion is contrary to pertinent NLRB case law and it is not supported by a preponderance of the evidence.

For these reasons, the ALJ's findings that Respondent engaged in objectionable conduct, and in unfair labor practices within the meaning of Section 8(a)(1) of the Act are unsupported by the record and contrary to applicable law. Accordingly, those findings should be reversed and the Complaint dismissed with prejudice.

I. STATEMENT OF THE CASE

This is a consolidated unfair labor practice and election objections case involving Respondent and American Federation of Government Employees ("AFGE" or "the Union") Local 2022, arising out of Taylor Motors' facility in Fort Campbell, Kentucky.

Respondent provides school bus transportation services to students living on military bases, such as Fort Campbell. On September 29, 2014, the Union filed a petition for an election in Case No. 10-RC-137729. The election was held in the break room at Respondent's facility on November 6, 2014. The vote tally reflected 33 votes cast for the Union and 32 votes cast against the Union.

On November 12, 2014 Respondent filed objections to the November 6 election. Respondent's objections included the racially-charged threats that bus driver Williams made to

his co-workers while they were standing in line to cast their ballots. Thereafter, on December 8, 2014, Respondent and the Union entered into a stipulation to set the election aside and to conduct a second election on January 15, 2015.

In the meantime, the Union filed the first of the unfair labor practice charges which are consolidated in the Complaint in this matter. Specifically, on November 24, 2014, the Union filed charges docketed as Case Nos. 10-CA-141455 and 10-CA-141578.

The Board conducted the second election in Case No. 10-RC-137729 on January 15, 2015. The tally of ballots reflected that 28 employees had cast ballots in favor of the Union, and 33 employees had voted against the Union. The Union filed objections to the January 15 election.

On January 30, 2015, the Union filed an unfair labor practice charge, docketed as 10-CA-145467. On that same date, the Union amended its charges in Case Nos. 10-CA-141455 and 10-CA-141578.

The Regional Director for Region 10 issued a report on objections and order directing hearing on February 20, 2015. On February 23, 2015, the Regional Director issued an order Consolidating Cases, Consolidated Complaint, and Notice of Hearing. Respondent timely filed an Answer to the Complaint.

On April 19, 2015, the Union filed a request to withdraw two of its objections, and the Regional Director approved that request on April 21, 2015. Accordingly, the only objections remaining at issue in this proceeding are those also alleged as unfair labor practices.

A hearing was held before ALJ Keltner Locke (the "ALJ") on April 22, 23, and 24, 2015. After all sides rested, the hearing was continued until June 5, 2015, at which time the parties were permitted to make oral argument on the record.

On July 14, 2015, the ALJ issued Findings of Fact and Conclusions of Law. The ALJ erroneously concluded that Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, and further concluded that the January 15, 2015 election should be set aside. Three of the violations found by the ALJ also correspond with election objections filed by the Union.

Respondent appealed to the Board, arguing the ALJ's finding that Williams did not make the threatening statements attributed to him was based on erroneous credibility determinations and was wholly unsupported by a preponderance of the evidence. Moreover, Respondent argued, among other things, that the ALJ incorrectly applied relevant NLRB precedent when he concluded (1) Williams' conduct was protected under the Act and (2) the ultimate burden was on Respondent under the *Burnup & Sims* analysis.

On March 13, 2017, the Board issued a decision finding the ALJ erred when he improperly placed the ultimate burden on Respondent under the *Burnup & Sims* framework to show that Williams made the threatening statement, when he should have placed the ultimate burden on the General Counsel to affirmatively establish that Williams did not make the statement. The Board ordered the ALJ to, on remand, (1) take into account all the relevant record evidence to determine whether the General Counsel carried the ultimate burden under the *Burnup & Sims* analysis, and (2) to consider whether the 2015 election should be set aside because of Respondents discharge and suspension of Williams (should he again find them unlawful) and the Respondent's maintenance of the CDNA.

On September 29, 2017 the ALJ issued his Supplemental Decision. In that decision, the ALJ again erroneously concluded that Respondent engaged in unfair labor practices within the

meaning of Section 8(a)(1) of the Act, and further concluded that the January 15, 2015 election should be set aside.

As discussed in detail below, the Board should reject and reverse the ALJ's decision for multiple reasons. First and foremost, the ALJ's findings and conclusions are not supported by a preponderance of the record evidence. More specifically, the ALJ's finding that Williams did not make the threatening statements attributed to him is based on erroneous credibility determinations, and is wholly unsupported by a preponderance of the record evidence. Moreover, the ALJ incorrectly applied relevant NLRB precedent when he concluded that Williams' racially-threatening statement was protected under the Act, and when he concluded that Respondent maintained an overly broad CNDA which would reasonably cause employees to believe they could not engage in certain activities, such as the discussion of wages and working conditions.

The evidence makes clear that the ALJ's decisions, conclusions, and recommendations cannot be supported by a preponderance of the record evidence considered as a whole. For these reasons and all those discussed below, the ALJ's decisions and recommendations with respect to the unfair labor practice violations he found should be overturned, the Complaint should be dismissed in its entirely, and the results from the January 15, 2015 election should be allowed to stand.

II. ISSUES AND EXCEPTIONS PRESENTED

1. Did the ALJ err in finding that the exculpatory denial made by Williams concerning the hanging statement attributed to him is more credible and reliable than the testimony of Terri Nolen and Janice Schwenz, because that credibility determination is erroneous

and because Williams' exculpatory denial is not supported by the preponderance of the evidence? ALJSD p. 8 lines 21–25; p. 9 lines 31–33; p. 11 lines 22–24.

2. Did the ALJ err in finding that "the General Counsel has proven that the asserted misconduct did not, in fact, occur" because that conclusion is not supported by a preponderance of the evidence in the record? ALJSD p. 9 lines 35–36, p. 11 26–29.

3. Did the ALJ err in finding that the General Counsel satisfied its burden under the *Burnup & Sims* framework, because that conclusion is not in accord with applicable NLRB precedent nor is it supported by a preponderance of evidence in the record? ALJSD p. 9 lines 35-36.

4. Did the ALJ err in finding that "a reasonable person, seeing [Williams'] jovial mood, would regard the words as attempted humor, not attempted intimidation" because that conclusion is not supported by a preponderance of the evidence in the record? ALJSD p. 11 lines 5–8.

5. Did the ALJ err in finding that the statements attributed to Williams did not constitute threats of physical violence and did not create a racially-charged environment or intimidation, because that conclusion is not in accord with applicable NLRB precedent nor is it supported by a preponderance of the evidence in the record? ALJSD p. 11 lines 20-22.

6. Did the ALJ err in finding that "nothing in the record suggests that Williams had either the ability or the intention to hang anyone" because that conclusion is not supported by a preponderance of the evidence in the record? ALJSD p. 11 lines 17–18.

7. Did the ALJ err in finding that the words attributed to Williams would not be regarded as a threat or an intent to intimidate, but would instead be viewed as an attempt at

humor because that conclusion is not supported by a preponderance of the evidence in the record? ALJSD p. 11 lines 20–22.

8. Did the ALJ err in finding that the discharge of Williams violated the Act because that conclusion is not supported by a preponderance of the evidence in the record? ALJSD p. 12 lines 7–8.

9. Did the ALJ err in finding that the discharge of Williams had a coercive effect on the second election because that conclusion is not supported by a preponderance of the evidence in the record? ALJSD p. 12 lines 10–12.

10. Did the ALJ err in finding that the racially-threatening statements attributed to Williams were not so opprobrious so as to take him outside of the Act's protection? ALJSD p. 11 lines 20-22.

11. Did the ALJ err in finding that the Respondent unlawfully required employees to sign a confidentiality agreement which they would reasonably understand to limit their ability to speak with Union representatives or each other because that conclusion is not supported by a preponderance of the evidence in the record? ALJSD p. 12 lines 14–23.

12. Did the ALJ err in finding that Respondent's confidentiality agreement "destroyed the laboratory conditions necessary for a fair and uncoerced election" because that conclusion is not supported by a preponderance of the evidence in the record? ALJSD p. 12 lines 25–28.

13. Did the ALJ err in making his conclusions of law because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's supplemental decision, does not support any of these conclusions? ALJSD p. 13 lines 10–29.

14. Did the ALJ err in issuing his proposed remedies, because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's supplemental decision, does not support any such remedies? ALJSD p. 14 lines 18-41; p. 15 lines 1-19.

15. Did the ALJ err in issuing his proposed Order because the preponderance of the evidence, much of which is not considered or addressed in the ALJ's supplemental decision, does not support the issuance of any such Order or portion thereof? ALJSD p. 13 lines 31–35; p. 14 lines 1–41; p. 15 lines 1–19.

III. STANDARD OF REVIEW

Respondent recognizes that, as a general matter, the Board's established policy is not to overrule an ALJ's credibility resolutions unless the clear preponderance of the all the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 [26 LRRM 1531] (1950), *enfd.* 188 F.2d 362 [27 LRRM 2631] (3rd Cir. 1951). However, when "the judge's resolution [ ] was not based on the demeanor of witnesses, but on facts established by other evidence and inferences drawn from those facts. . . . the Board is as capable as the judge of analyzing the record and resolving credibility issues." S*amsung Elecs. Am., Inc.*, 363 NLRB No. 105, *slip op.* at *3 (Feb. 3, 2016). (citing *Herman Bros., Inc.*, 264 NLRB 439, 441 fn. 12 (1982)).

While an ALJ can consider all the evidence without directly addressing in the written decision every piece of evidence submitted by a party, an ALJ's factual findings *as a whole* must show that he "implicitly resolve[d]" conflicts created by all the evidence in the record. *NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir. 1982); *see also NLRB v. Katz's Delicatessen of Houston St., Inc.*, 80 F.2d 755, 765 (2nd Cir. 1996) (An ALJ may resolve credibility disputes implicitly rather than explicitly where his "treatment of the evidence is

supported by the record as a whole."). The critical element in this standard is the phrase "on the record as a whole." As the Supreme Court instructs, the Board may not make its determination:

> … merely on the basis of evidence which in and of itself justifie[s] it, without taking into account contradictory evidence and evidence from which conflicting inferences could be drawn. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951).

Rather, the Board must "take into account whatever in the record fairly detracts from [the] weight" of the ALJ's decision. *TNS, Inc. v. NLRB*, 296 F.3d 384, 395 (6th Cir. 2002) (quoting *Universal Camera Corp.*, 340 U.S. at 487). Stated another way, it is "not good enough" that the record contain *some* evidence that could have conceivably supported an ALJ's finding. The *Universal Camera* standard is not satisfied if the ALJ does not discuss, or even provide a citation, to that evidence. *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 514 (7th Cir. 2003) (citing *Scivally v. Sullivan*, 966 F.2d 1070, 1076 (7th Cir. 1992) (holding that "the ALJ must minimally articulate his reasons for crediting or rejecting" evidence)); *Ppg Aerospace Indus., Inc.*, 353 NLRB 223, 224 (2008) (failure to explain credibility discrepancies resulted in remand of case in part).

The "clear preponderance of the evidence" standard only governs Board review of an ALJ's credibility determinations based on witness demeanor. *Standard Dry Wall Products, Inc.*, 91 NLRB at 545. *Standard Dry Wall Products* holds that the Board is to "base [its] findings as to the facts upon a de novo review of the entire record." *Id.* That same standard applies to the ALJ's legal conclusions and derivative inferences. *Id.*

IV. ARGUMENT

A. The ALJ's Conclusion that Respondent Violated Section 8(a)(1) By Suspending And Terminating Anthony Williams Is Erroneous, Because It Conflicts With Applicable NLRB Precedent And It Is Not Supported By a Preponderance Of The Evidence

(Exceptions 1 through 10)

1. Pertinent Background Facts

Respondent's facility is located on the military base at Fort Campbell. On October 31, 2014, a resident of the military base hung an offensive and inappropriate display outside of his home. (Tr. 139:4-17; 279:19-25; 296:9-24; 345:7-24). The display, which was located on Litwin Street, depicted an African American family being hung by ropes on a tree, as if being lynched. (Tr. 139:6-9; 279:19-25; 280:1-2; 345:24-25; hung 346:1-3). The effigies received significant media attention, and therefore became a hot topic of conversation among the employees at Taylor Motors, particularly during the week of the first election. (Tr. 141:1-8; 296:16-25; 297:1-20).

The first representation election in Case No. 10-RC-137728 was held at Respondent's Fort Campbell facility on November 6, 2014. Specifically, the election was held in the break room, which is off the large bus bay, at Respondent's facility. (Tr. 121:3-6; 181:24-25; 182:1; 219: 4-5). The election was held between 9:00 a.m. and 10:30 a.m. However, drivers and drivers' aides began lining up in the bus bay at approximately 8:30 a.m. to vote in the election. (T. 121:7-25; 148:12-17; 182:2-18). During the election and the period leading up to it, the bus bay where the voting line was forming was extremely loud and chaotic, and it was difficult to hear what anyone was saying if they were not right next to you. (Tr. 239:17-25; 240:1; 316:1-2; 338:19-25; 339:1-2; 342:10-13).

Williams arrived to the bus bay at approximately 8:30 a.m. on the day of the election. (Tr. 252:5-6). While employees were waiting in line to vote, Williams walked up and down the line and offered employees a ballpoint pen depicting the Union's logo, and he showed employees a "Vote Yes" graphic image that was on his phone. (Tr. 123:23-25; 150:13-18; 253:4-25; 254:1-25; 255:1-17; 341:12-24). Williams continued his patrolling and conversations with employees

after the voting started, and he did not actually get in line to vote until approximately 9:30 or 9:40 a.m. (Tr. 222:6-20; 256:20-25).

The Union won the first election by a vote tally of 33 to 32. (Joint Ex. 2.) Respondent filed objections to the election, including several objections relating to Williams' statements and conduct during the voting period. (Joint Ex. 3.)

Following the election on November 6, 2014, several employees submitted complaints to Transportation Manager, Charlotte Moore ("Moore"), regarding statements made by Williams during the election. (Tr: 89:9-17; 92:5-25; 93:1-17; 97:15-18; 98: 1-3). Terri Nolen ("Nolen") and Janice Schwenz ("Schwenz") complained of statements made by Williams in the voting area to the effect "that if they did not vote yes for the Union, he would hang them from a tree by a rope like they did for the Halloween joke on Litwin Street and like the way you all did to us back in the 60's."[2] (GC Exs. 3 and 4.)

In addition to the statements submitted by Nolen and Schwenz, three other employees complained to Moore regarding Williams' conduct and statements made during the election. Mary Jane Dotson ("Dotson") complained, among other things, that Williams told employees that if they tried to leave without voting, he would block the driveway. (GC Ex. 5.) In addition, Beate Poston ("Poston") complained that Williams was harassing her by showing her his phone with the "Vote Yes" graphic display on it. (GC Ex. 7.) Finally, Karla Livingston ("Livingston") made a complaint similar to that made by Poston. (GC Ex. 6.)

After Moore received the complaints and corresponding written statements from the aforementioned employees, she forwarded the relevant documents to General Manager, Greg DeLancey ("DeLancey"), so he could determine the appropriate course of action. (Tr. 48:3-7.) Based on his review of the employee statements, DeLancey concluded that Williams should be

[2] Williams is African American, while both Nolen and Schwenz are Caucasian.

suspended, so that Respondent could have additional time to investigate the allegations of racially charged remarks, which included threats of violence, attributed to Williams. (Tr. 53:16-22.).

DeLancey asked legal counsel to investigate the allegations against Williams, and to ascertain that the employee statements were genuine, accurate, and were provided voluntarily. (Tr. 59:4-12.) Following that independent investigation into the allegations concerning Williams' statements and activities during the union election, DeLancey made the ultimate decision to terminate Williams' employment. (Tr. 60:7-8) DeLancey's decision to terminate Williams' employment was based on Williams' racially-charged remarks, which included a threat of violence, as well as Williams' statement to another employee that he would block the driveway so the employee cannot get out. (Tr. 60:12-20.)

Nolen and Schwenz credibly testified at the hearing concerning the "hanging" statement attributed to Williams on November 6, 2014. (Tr. 127:20-25; 128:1-2; 152:9-12; 163:22-25.) Moreover, Nolen and Dotson credibly testified about the threatening statement attributed to Williams in the bus bay prior to the vote. (Tr. 124:7-11; 340:15-25; 347:16-25; 348:1.) Williams testified at the hearing, and not surprisingly, he categorically denied making any statements about hanging or the Halloween display on Litwin Street, or any other threatening comment. (Tr. 256:8-19.) The ALJ found that Williams' blanket denial was more credible and reliable than the detailed testimony provided by Nolen and Schwenz, which was corroborated by their nearly contemporaneous written statements. (ALJSD p. 8 lines 21–25.) Notably, the ALJ rested his reasoning on the assumption that because all the other individuals around Nolen and Schwenz in the extremely loud and chaotic voting line did not also hear the hanging comment, Williams did not make it. (ALJSD p. 6 lines 15–18.) Additionally, the ALJ discredited

Schwenz's testimony in its entirety because Schwenz testified at the hearing—which was approximately five and a half months after the 2014 election—that Poston spoke up in response to Williams' hanging comments, when in fact it was Nolen. (ALJSD p, 7 lines 11–16; p. 8 lines 15–19.) Despite the fact that a significant amount of time passed between the incident and the hearing, and that other than this lone discrepancy, the testimony of Schwenz and Nolen was specific, detailed, and supported by contemporaneous written statements, the ALJ never even entertained the possibility that, given the significant lapse in time, Schwenz may have been mistaken about which of her coworkers reacted to Williams' threat. Apparently, according to the ALJ, this lone minor discrepancy makes Williams' categorical denial more credible than all the other overwhelming evidence to the contrary. (ALJSD p. 8 lines 15–25.) This is yet another example of the ALJ construing the evidence so as to support his ultimate conclusions. When the record evidence is considered as a whole, as it should be, there simply can be no doubt that the ALJ erred in crediting Williams' exculpatory denial over the detailed and mutually-corroborative testimony of Nolen and Schwenz.

The ALJ's reasoning is highly flawed and is not supported by a preponderance of the evidence in the record. For starters, the uncontroverted evidence shows that Williams was continuously going up and down the voting line until he got in line to vote himself between 9:30 and 9:40 a.m. Moreover, the ALJ ignored the compelling and credible evidence that the bus bay where the voting line was situated was extremely loud and chaotic, which made it extremely unlikely that a witness would have heard everything that Williams said or saw everything he did.[3] (Tr. 239:17-25; 240:1; 316:1-2; 338:19-25; 339:1-2; 342:10-13.) On top of that, the ALJ

[3] For example, several witnesses testified that Williams was distributing Union pens to employees waiting to vote both before and during the election, and Williams also testified to that fact. (Tr. 222:6-20; 256:20-25; 341:12-21.) Nolen testified, however, that she did not observe Williams handing out Union pens. (Tr. 124:14-16). This just goes to show that not all witnesses heard or saw the same things while they were waiting to vote in the loud and

apparently bases his entire decision to discredit Schwenz's testimony on the fact that she cannot remember every little detail concerning what transpired at the election, which occurred approximately five-and-a-half months before the hearing. For all these reasons, the ALJ erred in finding that that the General Counsel satisfied its burden to affirmatively establish that Williams did not make the hanging statement attributed to him by Nolen and Schwenz.

2. The ALJ Erred in Crediting Williams' Blanket Denial Over The Detailed Testimony of Nolen and Schwenz

In finding that the evidence established that Williams did not make the hanging statement attributed to him by Nolen and Schwenz, the ALJ credited the categorical denial of Williams over the specific and detailed testimony put forth by Nolen and Schwenz. (ALJSD p. 8 lines 15–25.) The ALJ did not articulate any reason for his determination that Williams' testimony was more reliable, instead electing to conclusively state "[m]oreover, I credit Williams' testimony that he did not make the statement attributed to him." (ALJSD p. 8 lines 21–22.) That determination was clearly erroneous, and should be reversed. *See Mercedes Benz of Orlando Park*, 333 NLRB 1017, 1035 (2001), enfd. 309 F.3d 452 (7th Cir. 2002) (general denials by a witness are insufficient to refute specific and detailed testimony advanced by opposing side's witness).

At the hearing, Nolen credibly testified concerning the hanging statement Williams made during the election on November 6, 2014. Specifically, Nolen testified that while she was in line to vote, Williams commented to her, "If you do not vote yes, I'm going to hang – I'm going to take a rope and hang you. I'm going to take a rope and hang you by the neck like they did over on Litwin Street and like you all did to us back in the 60's." (Tr. 138:25; 139:1-3). In addition,

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chaotic bus bay during the time period from 8:30 until 10:30 a.m. Just because Nolen did not see Williams passing out pens does not mean that he was not doing so, a fact which is corroborated by the testimony of several witnesses, including Williams. The aforementioned example reflects the faulty logic used by the ALJ in reaching his erroneous conclusion.

Nolen testified that she was towards the back of the line, and Schwenz was either beside or behind her and Williams was in front of her. (Tr. 138:19-20.)

Indeed, Nolen's testimony is corroborated by the contemporaneous written statement she provided to Charlotte Moore on the day of the election. Specifically, Nolen complained to Moore that, "when we was in line to vote, Mr. Williams said y'all had better vote yes – if y'all don't I will put a rope around your neck and hang y'all from a tree like they did on Litwin Street for the Halloween Joke and the way y'all did us back in the 60's." (GC Ex. 3.) Thus, the substance of Nolen's testimony is similar, if not identical, to the statement she submitted on November 6, 2014. As correctly noted by the ALJ in his original decision, "Schwenz's testimony is similar but not identical to [Nolen's]. It is similar enough to corroborate Nolen's but not so similar as to suggest collusion." (ALJD p. 33 lines 40-41.) In addition, Nolen testified that she provided the statement to Moore voluntarily, and she did not receive any guidance as to what to include in the statement. (Tr. 142:5-19).

At the hearing, Schwenz also testified in significant detail concerning the "hanging" statement attributed to Williams on the day of the election. Specifically, Schwenz testified that Williams was asked by another employee, "what if it doesn't go your way," and Williams responded, "we'll just have to get some rope and do you guys like the Halloween thing over on Litwin and kind of like you guys did us back in the 60's." (Tr. 152:8-12.) In addition, Schwenz testified that she got in line to vote shortly before the polls opened, and that she was at the back of the line. (Tr. 149:15; 150:1.) Schwenz also testified that Nolen was in front of her in line, and Poston was in back of her. (Tr. 150:8-10).

Like Nolen's testimony, Schwenz's testimony is corroborated by the contemporaneous written statement she submitted to Moore the day of the election. Specifically, Schwenz

complained to Moore that, "as I stood in line to vote today on the union, one of the guys for the union, Anthony Williams #13 was saying to us if we didn't vote yes they were going to get a rope and hang us like the joke on Litwin Street and the way we did them (the Blacks) in the 60's." (GC Ex. 4.) Moreover, Schwenz testified that she provided the statement to Moore voluntarily, and she was not told what to write in the statement. (Tr. 165:9-25.)

Despite the fact that Nolen and Schwenz provided detailed testimony concerning the "hanging" statement attributed to Williams, the ALJ erroneously concluded that Williams' blanket denial was more credible. (ALJSD p. 8 lines 21–25.) When he testified at the hearing, Williams predictably denied that he made any comment about hanging or the Halloween display on Litwin Street, or that he made any other threatening comment. (Tr. 257:18-22.) Indeed, Williams' testimony on this subject is nothing more than a simple, self-serving "no – I didn't do it," which is wholly insufficient to overcome the detailed and corroborated testimony put forth by Nolen and Schwenz concerning the "hanging" statement.[4] *See Conley Trucking*, 349 NLRB 308, 319 (2007) (citing *Mercedes Benz of Orlando Park*, 333 NLRB at 1035 (it is settled that general or blanket denials by witnesses are insufficient to refute specific and detailed testimony advanced by the opposing sides' witnesses)).

3. A Preponderance Of The Evidence Does Not Support The ALJ's Finding That Williams Did Not Make The "Hanging" Statement Attributed To Him

The ALJ, as he did in his original decision, erroneously concluded that the evidence does not establish that Williams made the hanging statement attributed to him by Nolen and Schwenz (ALJSD p.9 lines 35-36.) In arriving at that highly-flawed conclusion, the ALJ relied primarily

[4] Moreover, the ALJ completely ignored the unrefuted record evidence that Nolen and Schwenz do not get along well with each other, which makes it highly unlikely that they would have colluded to accuse Williams of making an almost identical threatening statement about "hanging." (Tr. 109:6-25; 110:1-25; 111:1-25; 112:1-12; GC Ex. 16. The similarity and specificity between the testimony and statements of Nolen and Schwenz is quite telling, particularly since it is uncontroverted that they do not have the most amicable relationship.

on the facts (1) that Dotson and Poston did not specifically hear Williams make the hanging statement, and therefore they could not corroborate the testimony of Nolen and Schwenz[5]; and (2) that Schwenz testified at the hearing—which occurred approximately five and half months after the 2014 election—that Poston spoke up in response to Williams' hanging comments, when in fact it was Nolen. (ALJSD p. 8 lines 15–19.) The ALJ's reasoning is well off the mark for multiple reasons. Indeed, the preponderance of the evidence does not establish that Dotson, Schwenz, and Poston all should have heard Williams' make the "hanging" statement, and the ALJ again attempts to improperly place the burden on Respondent to show that Williams made the hanging statement. In short, considering all of the record evidence, the General Counsel has fallen far short of satisfying its burden of affirmatively establishing that Williams did not make the hanging statement, and the ALJ's findings to the contrary must be reversed. In addition, the ALJ completely ignored the temporal distance between the hearing and the 2014 election and all the credible record evidence that the bus bay where the voting area was located was very noisy and chaotic, which makes it highly unlikely that the employees waiting to vote would have heard every single thing an employee moving up and down the voting line said in a two-hour time period.

a. <u>The ALJ Erred in Discounting Nolen's Testimony Because the Evidence Does Not Establish That Dotson and Poston Should Have Heard Williams' Threatening Statement</u>

As he did in his original decision, the ALJ erroneously determined that because all the individuals purportedly around Nolen and Schwenz did not hear Williams' hanging statement, this means that it did not happen. In making this illogical inferential leap, the ALJ was again construing the evidence to support his conclusion, which is reversible error. Nolen testified at

[5] The ALJ's finding in that regard is directly at odds with his earlier conclusion that Dotson and Poston were not within "earshot" of Williams, and therefore, they could not have heard every single thing he said.

the hearing that after Williams made the threat, she responded to him, and he laughed at her. (Tr. 127:20–128:21.) After this exchange, Nolen testified that she did not say anything to the individuals around her in line, but that instead she just looked in Poston, Dotson, Schwenz's direction. (Tr. 128:22–129:2.) Nolen then testified "they just looked back at [her]" but did not say anything. (Tr. 128:22–129:6.) According to the ALJ, this is tantamount to testimony that all three individuals heard Williams' comment. But this is not the case.

The ALJ ignored persuasive evidence that, while Dotson may have been close to Nolen when Williams made his threatening remark, it is likely she would not have heard him. According to Dotson, the person in front of her in line was an employee named Antonio, and that the person in back of her was an employee named Maria. (Tr. 349:3-4.) This shows she was not standing next to Nolen when Williams made the hanging comment. Dotson further testified Williams was not stationary, but instead was walking up and down the line handing out pens and showing employees his phone. (Tr. 341:12-21.) According to Dotson, Williams was talking to numerous different employees, and she specifically testified that she could not hear everything he was saying because it was very loud in the bus bay. (Tr. 341:25; 342:2-16.)

This can also be said for the same testimony as it related to Poston. Poston testified that Janice Schwenz was in front of her in line by the time she got up to vote, but she does not specifically recall if Schwenz was in front of her the entire time she was in the voting line. (Tr. 191:9-18.) Poston further testified that while she was standing in line to vote, Williams was walking up and down the voting line talking to employees and showing them his phone, but that she could not hear everything Williams said to the other employees. (Tr. 191:1-3.) Thus, Poston's uncontroverted testimony makes it extremely unlikely that she could have heard every

single statement Williams made to employees in a crowded, loud bus bay with over 60 employees waiting to vote.

In fact, the General Counsel's own witnesses testified about how crowded and noisy the voting area truly was. Larry Cruthis ("Cruthis") testified that approximately 60 employees were in the bus bay by the time the voting started. (Tr. 239:17-19.) In addition, Cruthis testified that the voting area was very loud and chaotic, with a lot of employees all talking at once, and he could not hear anything specific another employee might have said. (Tr. 239:20-25; 240:1.) Linda Collins, the Union's election observer, also testified that "it really did get loud in the first election." (Tr. 316:1-2.)

The ALJ certainly should have taken into account the atmosphere in the voting area (i.e., crowded and noisy) before reaching his conclusion that Dotson and Poston would all have likely overheard Williams make the "hanging" statement if he truly made it. He did not. Rather, the ALJ apparently ignored this overwhelming and credible evidence, perhaps because he erroneously assumed that the employees were waiting in a quiet, orderly line to vote – as would normally be expected during a representation election conducted by the NLRB. But, this was not the typical representation election; it was loud, chaotic, and tainted by objectionable conduct, so much that after Respondent filed objections, the election results were set aside through stipulation.

Based on the foregoing testimony, it is clear how unlikely it would be that three different individuals, spaced around Nolen in the loud, crowded voting area, all would have overheard Williams' threatening comment. The mere fact that someone may have been present or nearby does not mean they heard, or should have heard, Williams' comment. The much more likely scenario is what the evidence shows: one of the individuals (Schwenz) heard his comment, while

two others (Dotson and Poston) did not. The idea that Poston and Dotson were listening to all the conversations around them at once is not only illogical, it is impossible. Furthermore, the ALJ erroneously assumes that because Nolen made eye contact with Dotson and Poston, they were eavesdropping on her exchange with Williams. In short, when the record evidence is considered as a whole, a preponderance of the evidence does not support the ALJ's finding that Williams did not make the "hanging" statement attributed to him, and that conclusion should be reversed.

b. The ALJ Erred In Discounting Schwenz's Testimony Because She Testified Dotson Responded To Williams' Threatening Comment, When It Was Actually Nolen

The ALJ erroneously concluded that, because Nolen and Schwenz's testimony differ in regards to who replied to Williams' statement, their testimony was not credible. (ALJSD p. 8 lines 16–17.) But this minor inconsistency, which arose at the hearing five and a half months later, should not carry much, if any, weight. To quote the ALJ's original decision, their testimony at the hearing was "similar enough to corroborate [each other] but not so similar as to suggest collusion." (ALJD p. 33 lines 40-41.) But somehow, after his initial decision finding in favor of the General Counsel was called into question, these minor inconsistencies which had previously indicated truthfulness now indicate unreliability.

It is undisputed that Nolen and Schwenz both gave contemporaneous written statements describing Mr. Williams' threatening statements. Specifically, Schwenz wrote that, "as I stood in line to vote today on the union, one of the guys for the union, Anthony Williams #13 was saying to us if we didn't vote yes they were going to get a rope and hang us like the joke on Litwin Street and the way we did them (the Blacks) in the 60's." (GC Ex. 4.) Nolen made a similar written complaint to Moore on the day of the election, complaining that "while we were out in

the bay waiting to vote, Anthony Williams was threatening people that if they left before they voted, he was going to come after them." (GC Ex. 3.)

They also both gave credible, detailed testimony at the hearing. Nolen credibly testified that while she was in line to vote, Williams commented to her, "If you do not vote yes, I'm going to hang – I'm going to take a rope and hang you. I'm going to take a rope and hang you by the neck like they did over on Litwin Street and like you all did to us back in the 60's." (Tr. 138:25; 139:1-3). Schwenz also testified in significant detail concerning the "hanging" statement attributed to Williams on the day of the election. Specifically, Schwenz testified that Williams was asked by another employee, "what if it doesn't go your way," and Williams responded, "we'll just have to get some rope and do you guys like the Halloween thing over on Litwin and kind of like you guys did us back in the 60's." (Tr. 152:8-12.) In fact, the only area where they diverge is with regards to who responded to Williams' statement, Poston or Nolen.

In drafting his original decision, the ALJ noted this testimony, "is similar enough to corroborate [each other] but not so similar as to suggest collusion." (ALJD p. 33 lines 40-41.) But, without explanation, he changes his mind. His supplemental decision states that "Nolen and Schwenz disagree about who replied to Williams' statement and this conflict in the evidence diminishes, to some extent, my confidence in the reliability of their testimony." (ALJSD p. 8 lines 15–17.) When reaching this new conclusion, the ALJ fails to acknowledge that, after nearly six months, Schwenz was just mistaken about whom around her spoke up. In fact, it would be almost uncanny if she and Nolen were to precisely agree on every little detail. Overall, the fact that Schwenz, at a later hearing, testified that Poston spoke up—while Nolen testifies that it was her—does little if anything to reduce the credibility of their otherwise detailed and corroborating testimony which the ALJ originally found to be credible. This is certainly the case when it comes

to comparing their testimony to a self-serving, flat, "no – I didn't do it," denial. *See Conley Trucking*, 349 NLRB 308, 319 (2007) (citing *Mercedes Benz of Orlando Park*, 333 NLRB at 1035 (it is settled that general or blanket denials by witnesses are insufficient to refute specific and detailed testimony advanced by the opposing sides' witnesses)). The ALJ, instead of reevaluating the entire record and issuing a new decision as the Board instructed, decided to selectively use snippets of testimony he originally found credible to support his initial decision.

c. The General Counsel Has Not Carried Its Burden of Showing, By A Preponderance of the Evidence, That Williams Did Not Make The Threatening Statements Attributed To Him

It is true that "the Board customarily does not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces [the Board] that they are incorrect." *Samsung Elecs. Am.*, 363 NLRB No. 105, *slip op.* at *3 (Feb. 3, 2016). However, when "the judge's resolution [ ] was not based on the demeanor of witnesses, but on facts established by other evidence and inferences drawn from those facts. . . . the Board is as capable as the judge of analyzing the record and resolving credibility issues." *Id.* (citing *Herman Bros., Inc.*, 264 NLRB 439, 441 fn. 12 (1982)). And when "the inference that the judge [draws from the evidence] is no more persuasive than the alternative explanation of the [evidence] offered by the Respondent . . . . the evidence is in equipoise," and the General Counsel has not carried it's burden under the *Burnup & Sims* framework. *Id. (*citing *El Paso Electric Co.*, 350 NLRB 151, 152 (2007), *enfd.* 272 Fed. Appx. 381 (5th Cir. 2008)).

This is precisely what happened here. The ALJ determined, not based on their demeanors but on inferences drawn from other evidence, that the testimony of Nolen and Schwenz was not as credible as Williams' self-serving denial. (ALJSD p. 8 lines 15–25.) But, as *Samsung* states, if the Respondent can offer alternate explanations which are just as logical or persuasive, the

General Counsel has not carried its burden. Respondent submits that it has—at a minimum—offered inferences which are just as persuasive. Therefore, the General Counsel did not carry its burden of affirmatively showing that Williams did not make the hanging statement attributed to him, and the ALJ erred in finding otherwise.

4. The ALJ Erred in Finding That Williams' Statement to Nolen and Schwenz Constituted Protected Activity.

The ALJ incorrectly concluded that Williams' comment to Nolen and Schwenz constituted protected activity under the Act, because it was a "failed attempt at humor." (ALJSD p. 11 lines 20–22.) In his analysis, however, the ALJ discounts not only the substance of Williams' statement, but also the racial implications it entailed and the racially charged atmosphere in which it occurred.

As a general matter, when an employee talks to someone about the union, such talk constitutes activity which is protected by Section 7 of the Act. *General Electric Co.*, 255 NLRB 673, 682 (1981). There are certain categories of statements, however, that are exceptions to this general rule, such as threats of violence, which are unprotected under the Act. *Int'l Baking Co.*, 342 NLRB 136, 148 (2004) (employee's threats to co-workers that he would harm them if they did not support the union organizing efforts were unprotected); *Chicago Metallic Corp.*, 273 NLRB 1677 (1985) (unambiguous threats of violence are outside the protection of the Act).

There simply can be no question that the statement attributed to Williams by Nolen and Schwenz constituted a threat of physical violence, and therefore was unprotected under the Act. According to the testimony of Nolen and Schwenz, Williams told them that, "if they did not vote yes for the Union, they would get a rope and hang them from a tree like the Halloween joke on Litwin Street and the way you did to us back in the 60's." (Tr. 138:25; 139:1-3; 152:8-12.) The threatening statement attributed to Williams could not be any more specific or explicit. To be

clear, this is not the type of ambiguous statement, such as "the situation could get ugly" or "better bring [his] boxing gloves" that the Board deemed protected in *Kiewit Power Constr. Co.*, 355 NLRB 708 (2010). Rather, the statements attributed to Williams were not open to any interpretation whatsoever – if the employees did not vote for the Union, they would be hung by a rope on a tree.

Somehow, the ALJ discounts these statements by applying the incorrect legal standard. While he correctly states the test is "whether a reasonable person, under the totality of the circumstances, would feel intimidated or afraid" (ALJSD p. 10 lines 23–24.), he errs severely in the application of it.

First, he "posit[s] a hypothetical reasonable person whose perception and understanding are not distorted by [racial] prejudice." (ALJSD p.10 line 39 to p. 11 line 1.) This allegedly reasonable person in no way reflects the totality of the circumstances. The ALJ ignores the simple fact that the statement "I'm going to take a rope and hang you by the neck like they did over on Litwin Street and like you all did to us back in the 60's" is meant to invoke racial prejudices. It is a clear reference to the horrible and tragic lynchings of African Americans by white supremacists during the civil rights area. Adding to this was the Halloween display on base which depicted an African American family being lynched and which brought the issue close to home for Respondent's employees. (Tr. 139:6-9; 279:19-25; 280:1-2; 345:24-25; 346:1-3). It is undisputed that these effigies received significant media attention, and therefore became a hot topic of conversation among the employees at Taylor Motors, particularly during the week of the first election. (Tr. 141:1-8; 296:16-25; 297:1-20). The idea the ALJ should view Williams' comments through a reasonable person who has no idea about racial prejudices not only ignores the "totality of the circumstances," but defies logic. It is certain the ALJ would not make this

assumption if the races of the individuals were reversed, and it is unclear why he felt the need to do so here.

The ALJ then further discounts the violent undertones of Williams' statement, claiming that "hangings are rare" and that "nothing in the record suggests that Williams had either the ability or intention to hang anyone." (ALJSD page 11 lines 16–17.)[6] This is erroneous because it is a reasonable person's perception of the threat—not Williams' subjective intention behind it—that is relevant to this inquiry. The ALJ erred by taking Williams' intention into account when he should only have considered the effect Williams' threat had on those who heard it immediately before exercising their voting rights, which are protected under the Act. The test is not the actual intent of the speaker or the actual effect on the listener. *See Concepts & Designs, Inc.*, 318 NLRB 948, 954 (1995) (quoting *Smithers Tire*, 308 NLRB at 72.)

When applying this standard, Williams' racially charged references to civil right hate crimes makes it objectively clear that some form of physical violence would follow if they did not vote as Williams instructed. Indeed, Williams' comment was an "implicit warning that negative consequences would flow from a 'no' vote," which is sufficient to take the statement outside the protection of the Act. *Contempra Fabrics, Inc.*, 344 NLRB 851, 852 (2005) (employee's statement to a co-worker that "you had better not vote no for this union" constituted a threat, and therefore was not protected). Furthermore, once the context and surrounding circumstances in which Williams' "hanging" remark was made are considered, including (1) that the remark was made just one week after all of Respondent's employees observed the hanging display on Litwin Street, (2) the employees' clear understanding of the racial message of the display, (3) the race relations problems that were surfacing in other areas of the country at this

[6] It is unclear what the ALJ is referencing when he alludes to the "ability" to perform a hanging, because the ALJ did not include any discussion on this point.

time and (4) the statement was made to employees right before they were to cast their ballots in a union representation election, there is no question a reasonable employee would find the comment to be threatening. Based on the foregoing, the ALJ erred in finding that Williams' "hanging" comment did not constitute a threat or otherwise intimidate employees, which would take the statement outside the protections of the Act, and that conclusion should be reversed.

5. The ALJ Erred In Finding That Williams' Hanging Statement Was Not So Opprobrious That He Lost The Protection Of The Act

Williams' racially-charged threat of violence directed at Nolen and Schwenz was clearly serious misconduct which was so opprobrious that Williams lost the protection of the act under *Atlantic Steel*, 245 NLRB 814 (1979) and its progeny. Accordingly, Respondent did not violate the Act by suspending and discharging Williams for making the threat of violence, as the ALJ erroneously concluded.

To determine whether an employee's conduct is so egregious that it loses the Act's protection under *Atlantic Steel*, the Board balances four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. *See Plaza Auto Center, Inc.*, 355 NLRB 493, 494 (2010), enfd. in part 664 F.2d 286 (9th Cir. 2011), decision on remand 360 NLRB No. 117 (2014). This multifactor framework allows the Board to balance employee's rights with the employer's interest in maintaining order at its workplace. *Id*.

Application of the *Atlantic Steel* factors leads to the obvious conclusion that Williams' misconduct was so opprobrious that he lost the protection of the Act. Specifically, Williams made the threat of violence in the voting line in the bus bay, where Respondent had a particularly strong interest in maintaining order and discipline, and therefore the first factor strongly weighs against protection. Moreover, as discussed above, Williams' remark directed to Nolen and

Schwenz cannot be construed in any manner other than as a threat, and thus the second and third factors also weigh overwhelmingly against protection. Finally, the record evidence does not show that Williams' threat was provoked by an unfair labor practice by Respondent, and therefore the fourth factor leans heavily against finding that Williams' conduct was protected. Accordingly, applying the *Atlantic Steel* framework, the record evidence does not support the ALJ's finding that Williams' statement was not so opprobrious that he lost protection of the Act, and that conclusion should be reversed.

B. The ALJ's Other Conclusions In His Original Decision, As They Relate To Charlotte Moore's Conversations With Williams In August 2014 and Respondent's CNDA Are Likewise Not Supported By A Preponderance Of The Evidence.

(Exceptions 8 and 9)

In his supplemental decision, the ALJ relies upon, but does not further evaluate, his findings that (1) Transportation Manager Charlotte Moore's conversation with Williams occurring in Respondent's parking lot in August of 2014 constituted an unlawful interrogation, and (2) Respondent Violated the Act by maintaining an overbroad Confidentiality/Non-Disclosure Agreement ("CDNA"), and that the maintenance of such CDNA materially affected the results of the January 15, 2015 Representation Election. Because the ALJ does not further expound upon those erroneous conclusions, Respondent will likewise not further propound upon their exceptions. Respondent, therefore, relies on its Brief excepting to the ALJ's original decision on these arguments.

CONCLUSION

The record evidence easily establishes that the General Counsel did not satisfy its burden to show that Respondent violated the Act, and its claims cannot be sustained. As Respondent's exceptions reveal, the ALJ made numerous reversible errors in concluding to the contrary. For these and all of the reasons discussed above, Respondent's exceptions should be accepted, the findings and conclusions of the ALJ to which Respondent excepted should be overturned, the Board should conclude that no violations of the Act occurred, the Complaint should be dismissed in its entirety with prejudice, and the results from the January 15, 2015 representation election should be allowed to stand.

Respectfully submitted this 24th day of October, 2017.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

TAYLOR MOTORS, INC.,

And **Cases 10-CA-141565**
10-CA-141578
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TAYLOR MOTORS, INC.,

And **Case 10-RC-137728**

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFGE), AFL-CIO, LOCAL 2022

CERTIFICATE OF SERVICE

I hereby certify that on this the 24th day of October, 2017, date I have served a copy of the foregoing *Respondent's Brief in Support of Exceptions to Administrative Law Judge's Supplemental Decision* on counsel for AFGE, Local 2022, by depositing same in the U.S. Mail, postage prepaid, and addressed as follows, as well as via Electronic Mail:

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